IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945

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MARTIN LEITHAUSER, Administrator of the Estate of P. J. LEITHAUSER, Deceased,

Petitioner,

—*vs.*—

HARTFORD FIRE INSURANCE COMPANY,

Respondent.

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## *BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI*

*To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States:*

**1. The Circuit Court of Appeals has erroneously decided an important question of local law in a way that is in conflict with the settled decisions of the Supreme Court of Ohio and with Section 9583 of the General Code of Ohio.**

Sec. 9583, General Code of Ohio, provides as follows:

> "A person, company or association insuring any building or structure against loss or damage by fire or lightning, by renewal of a policy, shall cause such building or structure to be examined by his or its agent, and a full description thereof to be made, and its insurable value fixed, by him. In the absence of any change increasing the risk without the consent of the insurers,

and also of intentional fraud on the part of the insured, in case of total loss, the whole amount mentioned in the policy or renewal upon which the insurer received a premium, shall be paid."

The language of the Ohio Code is clear and unequivocal. The Code nullifies nearly 59 conditions set forth in the policy of the respondent. Under the Statute, *there must be either some change in the insured property, increasing the risk without the consent of the insurers, or there must be intentional fraud on the part of the insured. The case at bar falls within neither of these two classes.*

Fortunately, the Circuit Court of Appeals simplified the issues by citing the three Ohio cases upon which it based its decision.

These cases are as follows:

> *Sun Fire Office of London* v. *Clark,* 53 O.S. 414;
> *Webster* v. *Dwelling House Ins. Co.,* 53 O.S. 558;
> *Germania Fire Ins. Co.* v. *Werner,* 76 O.S. 543.

With all due respect to that Court, we will show that the only part of the opinion in the first case which is applicable to the problem raised in the case at bar is in full accord with our contentions herein; that in the opinion in the second case, the Supreme Court of Ohio expressly mentions its former decisions in the cases of *United Firemen's Ins. Co.* v. *Kukral, People's Ins. Co.* v. *Bowersox, Insurance Co.* v. *Leslie,* and *Sun Fire Office of London* v. *Clark,* and in effect reaffirms the law to be as expressed in those cases; and that the third case is not in point at all.

The Circuit Court of Appeals ignored in its opinion the following cases upon which the petitioner chiefly relied, to wit: *United Firemen's Ins. Co.* v. *Kukral,* 51 O.S. 609; *Peoples Ins. Co.* v. *Bowersox,* 51 O.S. 567; *Insurance Co.* v.

*Leslie,* 47 O.S. 409; *Fire Ins. Co.* v. *Dennison,* 93 O.S. 404; *German-American Ins. Co.* v. *McBee,* 85 O.S. 161. Both parties relied upon the case of *Sun Fire Office of London* v. *Clark,* 53 O.S. 414.

**The great weight of the decisions of the Ohio Courts is against the forfeiture of a fire insurance policy where the defense is made that the policy is void because of the existence of a mortgage or encumbrance.**

The case of *The United Firemen's Ins. Co.* v. *Kukral,* 7 O. C. C. 356 (Affirmed by Supreme Court in 51 O. S. 609, April 17, 1894) is clearly in point with the case at bar. We have examined all of the papers in the *Kukral* case in the Common Pleas Court of Cuyahoga County, Ohio. There were three mortgages in force in the *Kukral* case at the time Mary Kukral secured her policy from United Firemen's Insurance Company, and they continued in force up until the time of the fire. The case went to the Supreme Court of Ohio twice. That Court rendered no opinion but simply affirmed the judgments of the lower court which held that the insurance company was liable for the full amount of the policy.

The defendant requested the trial court to charge the jury that:

> "If you find that the property insured was, at the time the policy was issued, encumbered by one or more mortgages, then the interest of the assured would not be the entire, unconditional and sole ownership, and she cannot recover in this action."

The defendant's request was refused.

The appellate court said in its opinion:

> "This very case has been before us before this proceeding in error upon this question, and we then de-

cided, as we do now, that there may have been a mortgage upon the insured premises, and in that sense the ownership may not have been entire, unconditional and sole; and yet the plaintiff may be entitled to recover under Section 3643, Rev. Stat. which has made an entire change in policies of fire insurance and in the law to be administered in such suits. The court would not have been justified in giving that request unless there were included the element of fraud."

"The learned judge delivering the charge so held, remarking that this very case had once been to the Supreme Court of the state upon the claim that the refusal to give this charge was error—a claim not sustained by that court."

"The next request, which was not given, was the third: 'If at the time the policy was issued, the property was mortgaged to nearly its entire value, and plaintiff did not disclose such fact to the defendant, that it would be a failure to disclose material facts affecting the risk, and that the plaintiff cannot recover.' *Without the element of intentional fraud we do not think that charge should have been given.*"

"We think it is unnecessary to enlarge upon this, in view of R. S. 3643 and 3644, and the decision of the Supreme Court, *Insurance Co.* v. *Leslie,* 47 Ohio State, 409."

### *Webster* v. *Dwelling House Ins. Co.*

In the following paragraph of its opinion in the *Webster* case, the Supreme Court of Ohio clearly indicated *that the law as expressed in the Kukral, the Sun Fire Office of*

*London, the Bowersox and the Leslie cases was to remain the law of Ohio.* The Court said:

> "The question involved is not different in principle from one of the questions disposed of in *Sun Fire Office* v. *Clark,* decided October 29, 1895, 34 L.B. 281, and the reasoning of the opinion in that case is so satisfactory, and so well supports the conclusion here reached, that further discussion is deemed unnecessary. It is further supported by the able opinion of the learned judge of the Circuit Court in *Dwelling House Ins. Co.* v. *Webster et al.,* 7 O. C. C. 611, to which special reference is here made. Our conclusion is also in harmony with the decision in *Ins. Co.* v. *Leslie,* 47 Ohio St., 409, and not inconsistent with the judgment of this court affirming *Ins. Co.* v. *Bowersox,* reported in 5 O. C. C. 444, and the judgment affirming *Ins. Co.* v. *Kukral,* reported in 7 O. C. C. 356, when the records in those cases are understood."

Accordingly, the Court must have decided there was a difference in the facts in the *Webster* case from the facts in the other cases that are cited. Now what is the difference between the *Webster* case and the *Kukral* case?

In the *Webster* case, the controlling and emphasized fact was that the mortgage was created *after* the issue of the policy. This act was contrary to an express stipulation in the policy that the policy should become void if the property shall be incumbered by mortgage. In the *Kukral* case, the several mortgages were all created *prior* to the issue of the policy. They were actually in existence at the time the policy was issued and at the time of the fire. In the *Leithauser* case, the alleged mortgage was likewise in existence at the time the policy was issued. In the *Webster* case there was a subsequent change in the status of the property

contrary to an express stipulation that there should be no such change. In the *Kukral* and in the case at bar there was no subsequent change in the status of the properties and there was no violation of an express stipulation that there should be no such change. *Accordingly, Sec. 9583, General Code, was interpreted to mean that once the policy became issued, there was nothing that could defeat payment in full except in cases where there was intentional fraud or a change that increased the risk.* In the *Webster* case, there was a change by reason of the creation of a mortgage; in the *Kukral* case and in the case at bar there was no such change. *By thus allowing the law of the Kukral case to stand as the law of Ohio, the Supreme Court must have interpreted Sec. 9583 to mean that when a policy is issued it is invulnerable to any attack based on pre-existing conditions affecting the title or ownership of the property, except in case of intentional fraud.* Such an interpretation is not inconsistent with the holding in the *Webster* case that the violation of a stipulation in the policy against the creation of a *future* incumbrance is enforceable and that its subsequent violation invalidates the policy.

The fact that the mortgages in the *Kukral* case violated the clause in the policy that the interest of the assured should be "the entire, unconditional and sole ownership" does not make that case different in principle from the case at bar where the alleged breach consists of a violation of the clause that the subject of insurance shall not be personal property and shall not be incumbered by a chattel mortgage. Certainly, there is no sole and unconditional ownership where there is an outstanding mortgage, and the Supreme Court explicitly held in the *Kukral* case that the existence of mortgages at the time the policy was issued did not prevent the recovery of the full amount of the insurance, because of the provisions of Sec. 3643, Rev. Stat., which is now Sec. 9583 of the General Code of Ohio.

### *Sun Fire Office of London* v *Clark.*

Next, what is the difference between the *Webster* case and the case of *Sun Fire Office of London* v. *Clark?* An examination of the opinion in that case shows that it lends no support whatever to the decision in the *Webster* case. On the contrary, it directly supports the petitioner's contentions in the case at bar.

In the *Sun Fire Office* case, the Supreme Court held that the lower court was right in holding that the insurer could not successfully assert the defense that a conveyance, which was in effect a mortgage, was executed in violation of the terms of the policy, because the instrument, considered as a mortgage, did not increase the moral hazard of the insurer (53 O.S. 414, at page 423).

This conveyance was executed after the policy was issued, and therefore it is impossible to reconcile the opinion with the decision in the *Webster* case.

The final judgment in the *Sun Fire Office of London* case was rendered in favor of the insurance company solely on the ground that the insured violated a stipulation in the policy that it should become void by the taking of additional insurance without the consent of the insurer. In the above circumstances, it is impossible to see how the holdings upon the two main issues raised in the *Sun Fire Office of London* case lend any support whatsoever to the decision in the *Webster* case or to the decision of the Circuit Court of Appeals in the case at bar.

### *Peoples Insurance Co.* v. *Bowersox.*

Next, what is the difference between the facts in the *Webster* case and the facts in the case of *Peoples Ins. Co.* v. *Bowersox,* 51 U. S. 567, the law of which was expressly allowed to stand when the Supreme Court rendered its de-

cision in the *Webster* case? In the *Bowersox* case, the court also construed Sec. 3643, Rev. Stat. (now Sec. 9583, General Code of Ohio). The court held that where judgments and statutory liens were procured against the insured property subsequent to the issue of the policy, *the policy was not invalidated* in spite of a stipulation in the policy that "if the assured shall procure, or suffer to accrue any incumbrance covering the property therein specified, or any part thereof" the insurance thereunder shall immediately cease and determine. In the *Webster* case, the lien was created by the giving of a mortgage. In the *Bowersox* case, the lien was created involuntarily, so there was no intentional fraud. In the *Webster* case, the lien was created by the insured voluntarily and in wilful violation of the stipulation in the policy. In the *Bowersox* case, no intentional fraud could be predicated; in the *Webster* case the court might have inferred intentional fraud because of the wilful violation of a stipulation in the policy. By such reasoning, the Supreme Court may have been warranted in saying, as it did, that the decision in the *Webster* case was not inconsistent with its decision in the *Bowersox* case. Accordingly, the *Bowersox* case is still the law of Ohio, which is that an incumbrance against the property will not defeat payment even though such incumbrance arises after the policy is issued, provided it was not created by the voluntary act of the assured.

### *Insurance Company* v. *Leslie.*

The remaining case cited by the Supreme Court of Ohio in that part of its opinion, hereinbefore quoted, in the *Webster* case is *Insurance Co.* v. *Leslie,* 47 O. S. 409. The *Leslie* case is without doubt the most outstanding case in Ohio upon the question of the purpose, the meaning, the scope and the spirit of the Valued-policy statute now under consideration.

*The Supreme Court in the Webster case recognized that the decision in the Leslie case still stood as the law of Ohio when, as hereinbefore quoted, it declared*: "Our conclusion is also in harmony with the decision in *Ins. Co.* v. *Leslie,* 47 O. S. 409".

If any decisions could be inconsistent with or obnoxious to the principles of the *Leslie* case, those decisions were the ones rendered in the *Webster* case and in the case at bar. To support this statement, we will now quote from the opinion of the Supreme Court in the *Leslie* case:

> "The legislatures of several of the States, enacted statutes designed to give greater certainty to the contract of insurance, and protect the insured against unreasonable forfeitures and defenses; which statutes, it is generally held, apply to and control all policies issued subsequent to their enactment."

> "The policy in suit having been delivered in this State, to a citizen thereof, insuring real property there situate, is an Ohio contract, and the foregoing sections of the statutes being in force when it was issued, they entered into, and became part of the contract of insurance, fixing the measure of the obligation created by it, and controlling its construction and operation."

> "The purpose and scope of the statute are not doubtful. It was designed, as its title declares, 'to regulate contracts of insurance of buildings and structures.' "

> "The statute cannot, we think, be treated as conferring upon the assured a mere personal privilege which may be waived or qualified by agreement. It has a broader scope. It molds the obligation of the contract into conformity with its provisions, and establishes the rule and measure of the insurer's liability. *Terms and*

*conditions embraced in the policy inconsistent with the provisions of the statute, are subordinate to it, and must give way."*

### *Insurance Co.* v. *Werner.*

Likewise, the case of *Insurance Co.* v. *Werner,* 76 O. S. 543, cited by the Circuit Court of Appeals, gives no support to the decision of the case at bar. The two cases are wholly different as to the facts and as to the issues involved. No mortgage or incumbrance was involved in the *Werner* case. The insured vacated the building in direct violation of a stipulation in the policy to the effect that the insurance should become void if the premises became vacant without the knowledge or consent of the insurer. Here again a condition was voluntarily created by the insured *after the policy was issued,* as in the *Webster* case, and the court held there could be no recovery under the policy.

Later cases which adopted the interpretation given to Sec. 9583, General Code (Sec. 3343 Rev. Stat.) in the case of *Insurance Co.* v. *Leslie* (*supra*) are the following:

*Fire Insurance Co.* v. *Dennison,* 93 O. S. 404. Quoting from the opinion:

"Adhering to the rule uniformly adopted in this state that this section (9583) becomes a part of every fire insurance contract, it devitalizes every such contract inconsistent with its provisions. This section requires in all cases of total loss to buildings and structures, that the whole amount mentioned in the policy upon which the insurer received a premium shall be paid, and furthermore that in case of partial loss, the full amount of such partial loss shall be paid."

***German-American Ins. Co.* v. *McBee*, 85 O. S. 161.**

In this case, the Supreme Court of Ohio held:

> "But it has not been questioned in any case that the statute (referring to the provisions of Sec. 9583) enters into and becomes a part of every fire insurance contract, and supersedes and annuls all terms in any such contract which differ from its provisions. *Insurance Co.* v. *Leslie*, 47 O. S. 409, *Insurance Co.* v. *Russell*, 65 O. S. 255, *Insurance Co.* v. *Drackett*, 63 O. S. 41."

The case at bar was in this Court upon two prior occasions, the last one being here upon the Petition for certiorari filed by respondent herein and seeking a review of the decision of the Circuit Court of Appeals, reported in 124 F. (2d) 117. In those proceedings, the Hartford Fire Ins. Co. sought to nullify the policy on the ground that Leithauser's interest was not that of sole and unconditional ownership in fee. Certiorari was denied. In the opinion that was then reviewed by this Honorable Court, *Judge Hicks* of the Circuit Court of Appeals said:

> "We think that the testimony in this case establishes that it was the mutual intention of the parties to effect a contract of insurance upon the elevator regardless of the provision in the policy which rendered it void unless Leithauser's interest therein was that of sole and unconditional ownership in fee. Any contrary inference is inconsistent with the commonly accepted principles of fair dealing."

*That statement is equally applicable to the alleged chattel mortgage issue which is now before the Court.*

**2. The Circuit Court of Appeals has decided an important question of general law and of general and great public**

**interest in a way that is contrary to the public will as expressed by legislative enactment in Ohio and in the Valued-policy statutes of many other States of the United States in holding that Section 9583 of the General Code of Ohio does not bar the making of the defense that the policy is void because a mortgage existed against the insured property at the time the policy was issued, even though there was no change increasing the risk and even though there was no intentional fraud on the part of the policy-holder that was pleaded or proven.**

The purpose and spirit of Sec. 9583, General Code, are very aptly and clearly stated by *Judge Howland* in his opinion in *Henderson* v. *Ohio Farmers Ins. Co.*, 2 O. N. P. 19-20, from which we quote as follows:

> "The system of 'open policies' did not include technical defenses. They were engrafted upon that system by a multitude of conditions, limitations, contingencies and requirements, and each was made a conditional defense, or forfeiture in the policy, which remained unsettled and dormant, in the fine print of the policy, as so many traps, awaiting a loss; they were sustained as forfeitures and defenses, by the courts, only, because they were in the policies, and therefore a part of the contract; although the company was in no way injured, by them, or the risk increased thereby; they were, therefore, unreasonable and technical defenses and forfeitures. In the event of a loss, they were urged against the insured. The cases were few, in which, one or more of them, could not be urged as such a defense or forfeiture. The necessities of the insured, after the loss; the delays and expense of litigation; the doubtful liability of the company, under the policy, the danger that one or more, technical or unreasonable defenses might be sustained by the court, usually compelled the in-

sured, to accept the inevitable compromise, on any terms he could induce the adjuster to offer."

"*The purpose* of the act is, to do away with all technical and unreasonable defenses and forfeitures; establish a uniform rule for determining the validity of all defenses; do away with inflated insurance, and thereby avoid all the consequences thereof, public and private; to do away with computing premiums, upon one amount of insurance, and paying losses upon another; and make the liability of the company definite and certain at the time the policy is issued, and to do away with 'open policies' and require and establish the use of 'valued policies' in Ohio."

As Blackstone said: "There are three points to be considered in the construction of all remedial statutes: the old law, the mischief and the remedy".

Justice Williams of the Supreme Court of Ohio in his opinion at page 413 in the case of *Insurance Co.* v. *Leslie* (*supra*) covered the purpose of the enactment of Section 9583 (formerly Sections 3643 and 3644) in the following language:

"The conditions contained in policies of insurance, both life and fire, and the exceptions to the risk and the contingencies upon which the company should be relieved from liability, became so numerous and complicated, usually printed in small type on the back of the policy, in terms which persons unlearned in the law or business of insurance would not readily understand, that it became a matter of no little difficulty for the assured to tell whether the policy afforded him an indemnity or not; and when the event insured against, happened, the uncertainty of his claim against the company constrained him to abandon, compromise

or litigate it. The legislatures of several states enacted statutes designed to give greater certainty to the contract of insurance, and protect the assured against unreasonable forfeiture and defenses, which statutes it is generally held apply to and control all policies issued subsequently to their enactment. Of this character is the act of the legislature of this state, passed March 5th, 1879, entitled 'An act to regulate contracts of insurance on buildings and structures'. This act with some important verbal changes, is carried into the revision of 1880, and is now sections 3643 and 3644 of the Revised Statutes".

In the able, dissenting opinion of *Judge Woodbury* of the Circuit Court of Ohio (now Court of Appeals) in the case of *Webster* v. *Dwelling House Insurance Company* (*supra*), he said at page 535:

"We now come down to 1879, when the legislature of the state commenced legislating in regard to fire insurance, when this act was passed, and the object and purpose of all these statutes was to relieve persons who were holding policies of insurance upon the face, from being defeated by the innumerable conditions which were attached to the back of the policy, or to a separate sheet of paper. The condition of affairs had become such, not only in Ohio, but in all of the states of this Union, that while it appeared that a man had insurance upon the face of the policy, yet upon the back of it there were such conditions as that he had in fact no insurance; and so it is said by the Supreme Court, in the case to which I have referred in 47 O. St., and so it is said by the Supreme Court of New Hampshire in the case referred to in the 47th."

"What was the mischief that led to the enactment of the 25th section of our statute hereinbefore quoted? The answer is obvious. The Supreme Court, in Ins. Co. v. Leslie, have recited the mischief against which the legislature were seeking to provide a remedy. If that was the mischief, then the remedy is to be extended. If other provisions or conditions in policies were of a kind and character that they were protecting wrong all over the state, and were defeating parties from recovering insurance upon their property upon mere technicalities, that did not go to the substance; if that is what they were providing for as is said in the case the 47th Ohio State Reports, then we are to look to those things with a view of determining what the legislature meant when they sought to provide two grounds upon which a recovery might be defeated; *or in other words, when they provided that the amount of the policy should be paid in the absence of the two grounds.*"

Quoting further, at page 538:

"The legislature were not content in simply stopping with the fact that the agent of the company should fix the insurable value of the property; but they go forward and provide that in the absence of any change increasing the risk without the consent of the insurers, and also of intentional fraud on the part of the insured in case of total loss, the whole amount mentioned in the policy or renewal upon which the insurers receive a premium shall be paid. The first provision here evidently provides for what may occur subsequently; but it is not a mere change. It must, in order to defeat the recovery, be such a change as increases the risk, and this is to be without the consent of the insurer. Then it provides also, in the absence of intentional

fraud on the part of the insured it shall be paid. *It seems to me that the legislature intended to do something more than to provide for what should occur at the time of the fixing of the value of the property by the agent. If they did not intend to provide more, why did they undertake to carry in the language, then, 'In the absence of intentional fraud on the part of the insured'?"* * * * (Italics ours.)

"I have simply said what I have, because I dissent with my associates upon the true rule which is to be applied to this statute in construing it. In my judgment, the rule upon which the majority of the court have based their opinion does not apply; but like the case in 26 Ohio State, we are to look to the intent of the legislature; we are to look to the mischiefs which they were seeking to remedy, and whatever they are, we are there to extend the remedy."

"I may say the rule to which I have referred has been applied to numerous cases in the state of Ohio, both prior and subsequent to the decision in 47 Ohio State, and I am influenced in this regard, because the Supreme Court, in the case of 47 Ohio State, followed that rule, instead of the rule of narrower construction and because it is just."

One of the leading cases in Ohio on this subject and one that is squarely applicable to the case at bar is *Insurance Company* v. *Luce,* 11 O. C. C. 476; Affirmed by the Supreme Court, 59 O. S. 609.

*In the Luce case, the assured had treated the insured building or structure as personal property, just as Leithauser had done in the case at bar by executing a chattel mortgage upon the elevator and equipment, and yet the court*

*held that it was a building or structure and therefore came within the provisions of Section 9583.* We quote from the opinion:

> "If this was a structure within the meaning of that statute, then it makes no difference what the parties have done about it, or what contract they have made with reference to it, or what they said after the loss occurred, they have not waived their right to insist upon the payment of the full measure of their damages as fixed by law."

In the *Luce* case, the court directly passed upon the question as to whether a boiler and engine, constructed upon permanent foundations in the basement of a building, constituted a structure within the meaning of Section 3643, Rev. Stat. (now Sec. 9583, General Code). We quote from the syllabus, which in Ohio is held to state the law of the case:

> "1. Under the terms of an insurance policy describing 'one boiler engine and apparatus pertaining thereto, contained in the five story and basement brick, metal roof, Musee theatre building, Number 240, Summit Street, Toledo', which boiler and engine were in fact built in the basement of said building, and constructed upon permanent foundations, the boiler being enclosed by a brick wall, the court would be justified in instructing the jury that the same constituted a structure within the meaning of Section 3643, of the Revised Statutes, under which, in case of a total loss, the insurer is bound to pay the full insured value of the property."

The *Luce* decision was followed and quoted as authority for a similar decision made by the Ohio Court of Appeals in the case of *Hartford Fire Ins. Co.* v. *Cincinnati Ice Mfg.*

*and Cold Storage Co.*, 9 O.A. 403. In that case the *Hartford Fire Ins. Co.*, which is the same company as respondent herein, insisted that the cooling tower and ice-making machinery, as detailed and described in the second clause of the property insured were "personal property or chattels" as distinguished from "real estate" and therefore that Sec. 9583 did not apply. The court over-ruled that contention and held that the building, fixtures and machinery were used as an entirety and came within the terms of the Valued-policy act. As we stated in our Petition herein, the Leithauser grain elevator building was constructed upon heavy, solid concrete foundations. Here, as in the former *Hartford* case, the insurance policy covered the building, machinery and equipment, which were being used as an entirety. In these circumstances, the property involved in the case at bar was assuredly not personal property, and therefore did not come within the terms of the personal property clause of the policy which is alleged to be violated in this case. The law abhors forfeitures, and the courts have always construed fire insurance policies strictly and if possible in a manner that will avoid any forfeiture.

## CONCLUSION

It will be seen from the foregoing discussion that the cases cited and relied upon by the Circuit Court of Appeals do not support the judgment rendered herein by that Court. We summarize the points made, as follows:

(1) *Sun Fire Office of London* v. *Clark*, 53 O.S. 414: This case, instead of being favorable to the respondent, actually holds that a conveyance which is only a mortgage will not defeat the policy. The Supreme Court of Ohio made two holdings: *first*, that the execution of a conveyance that "was simply a mortgage", after the policy was

issued, did not constitute a legal defense because it did not increase the moral hazard; *second,* that where additional insurance was taken without the consent of the insurer, the policy was invalidated because the risk was increased, and that the case was therefore within the exception mentioned in Sec. 9583.

(2) *Webster* v. *Dwelling House Ins. Co.,* 53 O.S. 558: This case involved a mortgage that was placed on the insured policy *after* the issue of the policy; it is expressly distinguished by the Supreme Court of Ohio from the case of *United Firemen's Ins. Co.* v. *Kukral,* 51 O.S. 609, which is a case directly in point with the case at bar and one of the cases chiefly relied upon by the Petitioner, and the law of which was allowed by the Supreme Court to stand as the law of Ohio.

(3) *Germania Fire Ins. Co.* v. *Werner,* 76 O.S. 543: The holdings upon the two issues raised in this case will be found on analysis to constitute no authority whatever in support of the decision of the Circuit Court of Appeals in the case at bar. The Supreme Court of Ohio decided only: *first,* that the clause in Sec. 9583 relating to a change that increased the risk referred only to physical changes in the corpus; *second,* that where, contrary to the terms of the policy and without the knowledge of the insurer the premises are vacated, the policy is invalidated and the plaintiff cannot recover the loss by fire.

Furthermore, we have shown how and why the decision of the Circuit Court of Appeals is contrary to the purpose, to the letter and to the spirit of Ohio's Valued-policy law, Sec. 9583 of the General Code.

Under the decision in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, this court must apply to this case the local law of Ohio, and not general law.

When the Circuit Court of Appeals cited *Sun Fire Office of London* v. *Clark* as its first and principal authority for its decision, it could not have read the following language in the Opinion of the Supreme Court of Ohio in that case:

> "The object of the provision containing the language was to protect the insurer against a possible change in the owner's insurable interest in the property by a sale, transfer or conveyance, whereby the hazards of the contract into which he had entered might be increased without his consent. Hence the generality of the language employed must be restrained to the reason and object of its use by the parties. To do otherwise would be to stick in the letter of the language employed by the parties to express their meaning, without regard to its spirit. *Hence, so far as the second defense was concerned, the undisputed evidence shows that there was no error in the Court's directing a verdict for the plaintiff. The execution of the conveyance, being simply a mortgage, did not affect the title or interest of the mortgagor in the property* (*Barry* v. *Insurance Co., supra*), *and whether made with or without the consent of the company is immaterial.*"

This case has been fought desperately for fifteen years. *The Hartford Fire Insurance Co.* is notorious for the number of times which its name appears in the courts of the various States of the United States. In all the reported cases, it has made every effort, as in the case at bar, to evade the payment of losses by relying upon technical interpretations.

The people of Ohio have fought since 1879 to secure the benefit of the provisions of Sec. 9583, General Code, and of the Valued-policy Statutes which preceded it.

If certiorari is granted in this case, every policy-holder in this country will have a renewal of that feeling of confidence which this Honorable Court inspired by its wise and fearless decision in the recent case of *United States* v. *South-Eastern Underwriters Association*. The benefits to be derived from a clarification by this Court of the meaning of Sec. 9583 of the General Code of Ohio will likewise be general and far-reaching.

The insurance companies have maintained powerful lobbies in every State legislature, and nothing has stopped their tireless fight against the public who want fire insurance that will give them 100% of their loss, instead of an unfair compromise or an interminable battle in the courts.

This Court will perform a signal service to the nation if it will uphold the Ohio Valued-policy Statute by giving to every single word in that statute an interpretation that will make it effective. The common citizen has only one dependable protector against the onslaughts of the combined power of the fire insurance companies and that protector is the Supreme Court of the United States!

Respectfully submitted,

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